

82-1762

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

TRUSTEES OF REX HOSPITAL, a Corporation;
JOSEPH BARNES, and RICHARD URQUHART, JR.,
v. *Cross-Petitioners,*

HOSPITAL BUILDING COMPANY,
Cross-Respondent.

**CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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Dated: April 28, 1983

QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred by ignoring directly conflicting recent Second, Fifth and Sixth Circuit authority to hold that the trial court had "discretion" in submitting special interrogatories to the jury to omit a requested separate interrogatory concerning a "hotly contested" issue on which substantial evidence was introduced at trial?

2. Whether the Fourth Circuit erred by holding that under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), all of plaintiff's damages need not flow from that which made the conduct illegal if the antitrust violation was the proximate cause of any part of the damages claimed by plaintiff?

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v.

HOSPITAL BUILDING COMPANY,
Cross-Respondent.

**CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The Trustees of Rex Hospital, *et al.*¹ respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit entered on October 19, 1982 as to the issues raised herein should this Court grant the petition for a writ of certiorari filed by the plaintiff-cross-respondent, Hospital Building Company, in *Hospital Building Co. v. Trustees of Rex Hospital, et al.*, Dkt. No. 82-1633 (filed April 6, 1983).

¹ Cross-petitioner Trustees of Rex Hospital ("Rex Hospital") has no affiliates, subsidiaries or parent companies.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit reversing the award of judgment to cross-respondent and remanding the case for a new trial is reported at 691 F.2d 678 (4th Cir. 1982). The Court of Appeals' order denying cross-respondent's Petition for Rehearing and Suggestion for Rehearing En Banc was filed on January 7, 1983. The opinion and order of the Court of Appeals appear as Appendices A and B respectively to Hospital Building Company's petition for a writ of certiorari.² The District Court issued no opinion; its unreported order entering judgment for cross-respondent based on the jury's verdict is reproduced as Appendix C to Hospital Building Company's petition for a writ of certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit in favor of cross-petitioner Rex Hospital was entered on October 19, 1982. Cross-respondent Hospital Building Company filed a Petition for Rehearing and Suggestion for Rehearing En Banc that was denied on January 7, 1983. Hospital Building Company's petition for a writ of certiorari was filed April 6, 1983 and received by defendants-cross-petitioners April 8, 1983. This cross-petition for a writ of certiorari is filed pursuant to Rule 19.5 of the Rules of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS AND RULES INVOLVED

Rule 49(a) of the Federal Rules of Civil Procedure provides:

(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of

² Appendices appearing in Hospital Building Company's petition for a writ of certiorari are cited herein as "Pet. App."

a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), provides in pertinent part:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. Proceedings Below

The full details of the lengthy procedural history of this case are set out in the petition for a writ of certiorari filed by cross-respondent and the brief in opposition thereto to be filed by cross-petitioners.

B. The Parties

Cross-petitioner Trustees of Rex Hospital is a non-profit corporation operating the Rex Hospital in Raleigh, North Carolina. The Rex Hospital is a non-profit hospital operating pursuant to state charter. Each of the Trustees of Rex Hospital is appointed by the Raleigh City Council and serves without compensation. Cross-petitioner Richard Urquhart, Jr. was the vice-chairman of the Board of Trustees of the Rex Hospital. Cross-petitioner Joseph Barnes was the executive director of the Rex Hospital.

Cross-respondent Hospital Building Company was a subsidiary of Charter Medical Corporation at the times relevant to this action. Charter operated a chain of proprietary for-profit hospitals throughout the country, including the Mary Elizabeth Hospital in Raleigh, North Carolina, through the Hospital Building Company.

C. The Facts

The facts concerning this case will be set forth fully in the Brief in Opposition to the Petition for a Writ of Certiorari. That statement is incorporated herein by reference and the following discussion reviews only those facts pertinent to a disposition of this cross-petition for certiorari.

In December 1970, Charter purchased the plaintiff, Hospital Building Corporation ("HBC"). HBC operated the Mary Elizabeth Hospital ("Mary Elizabeth") in Raleigh, North Carolina. Charter announced at this time that it intended to expand Mary Elizabeth to a size of 140 beds through the construction of a new hospital. Charter proposed to build the new hospital on a 6.9 acre site in Raleigh known as the "Tucker Site." (App. VII 3029-51.)³

³ As used in this cross-petition, "App." refers to the Joint Appendix on appeal; citations are to volume and page numbers.

State law required that any new hospital construction had to be approved by the Medical Care Commission, a state agency that was empowered to review applications for Certificates of Need and determine the adequacy of proposed sites for new hospital construction. HBC applied for a Certificate of Need on November 1, 1971. (App. VII 3029-51.) Rex Hospital opposed the application of the HBC for a Certificate of Need because the construction was unnecessary and would duplicate existing and planned facilities. (App. VII 2911.) After two hearings, a Certificate of Need was granted by the state on June 30, 1972 and Rex Hospital participated in an appeal to state court. (App. VII 2789, 2797.)

The appeal to state court was dismissed as moot on February 9, 1973 after the North Carolina Supreme Court ruled that the Certificate of Need law violated the North Carolina Constitution. (App. V 1915.) All opposition to the application of HBC for a Certificate of Need ceased at that time. Rex Hospital never took any further action to oppose the construction of a new hospital by the HBC in any way.⁴

On October 30, 1972, while the appeal in state court was still pending, Congress enacted the Social Security Amendments, 86 Stat. 1329 (1972), which added section 1122 to the Social Security Act. Section 1122 required local or state health-care planning approval of certain capital expenditures prior to allowing reimbursement for such capital expenditures under the federal Medicare and Medicaid programs. Approval was made on a case-by-case

⁴ In its petition for a writ of certiorari, Hospital Building Company alleges that a Blue Cross reimbursement policy somehow delayed construction. No such evidence was introduced at trial and the Fourth Circuit did not consider any Blue Cross policies in making the legal determinations relevant to this cross-petition.

basis in conjunction with state agencies designated by the Secretary of HEW.

In the case of North Carolina, no section 1122 approval was needed for the construction proposed by the HBC. (App. V 2057-61, 2117.) Acting on the erroneous belief that such approval was required, plaintiff filed an application for approval on March 16, 1973—over a month after the appeal to state court had been dismissed (App. IX 3701.) Approval was obtained on May 11, 1973, about the same time that Blue Cross approved the new hospital. (App. IV 1755; App. IX 3707, 3710.)

Even then, plaintiff did not begin construction of its hospital. As of June, financing was still available to the HBC from Hospital Investors, a real estate investment trust controlled by Charter. (App. I 375-76; App. III 944-45.) In July, interest rates began to climb and plaintiff claimed that it was not able to obtain any financing until the middle of 1977. (App. III 959; App. IV 1481-84.) By 1977, however, Charter had sold the Hospital Building Company to the Hospital Corporation of America which had promptly begun construction of the proposed hospital in January of 1977.

At trial, plaintiff's expert claimed that with financing plaintiff could have begun construction on or about June 1st, 1973 and opened on March 1, 1974. (App. IV 1605-06, 1643, 1736-37.) Plaintiff therefore claimed damages for a 51-month period of delay from March 1974 until June 1977, when the new owner of Mary Elizabeth, the Hospital Corporation of America, opened its new hospital. (App. IV 1605-06; 1643.) Specifically, plaintiff relied not only upon the alleged delay caused by the opposition to plaintiff's application for a Certificate of Need that lasted until February of 1973, but also upon (1) the delay caused by plaintiff's erroneous belief that approval of its facility was needed under

the new Congressional enactment of the Social Security Amendments, and (2) a further delay allegedly caused by the rise in interest rates in July of 1973—two months after plaintiff had obtained section 1122 approval. (App. I 316; App. III 921-29, 1172-75; App. IV 1579-1605; App. V 1875-77; App. VI 2516-17.)

Significantly, the expert's testimony that construction could have begun in 1973 rested upon the assumption that the hospital would have been built upon the Tucker site, which was the only land available to plaintiff in the 1971-1973 time frame. (App. III 1169; App. IV 1736-37.) This assumption among others was "hotly contested" at trial because the parties disagreed as to whether approval for a site as small as the Tucker site could have been obtained from the state.⁵ (Pet. App. A at 20a.) Among the evidence introduced by defendants on the issue was testimony by plaintiff's own expert witness, who testified on cross-examination that the 6.9 acre Tucker site was "[w]oefully inadequate" for expansion—an essential prerequisite to state approval for a building site. (App. III 1263-65, 1273-74.)

Proof that the Tucker site would not have been approved by the state, together with other evidence that plaintiff was not prepared to build a hospital in 1972, created a major factual issue for the jury's consideration. Given an opportunity, the jury could have easily found that plaintiff had been unprepared to enter the Raleigh "market" in 1972, thereby destroying plaintiff's entire theory of liability and damages. Defendants also moved for a directed verdict and judgment notwithstanding the verdict on this issue. (App. I 298-309; App. V 1794-1883.)

⁵ The Raleigh Community Hospital was finally built by the Hospital Corporation of America on a 16.13 acre site obtained by the Hospital Building Company in 1974. (App. III 1002; App. VI 2316.)

Focusing specifically on this issue of plaintiff's preparedness, defendants requested that the trial court add to the several interrogatories already set forth on the special verdict form an additional special interrogatory dealing with the issue of preparedness. (App. VI 2578-80.) The trial court rejected this request and the special interrogatories submitted to the jury omitted any question relating to the issue of preparedness. (See Special Verdict form appended hereto.)

D. The Fourth Circuit's Decision

Although the judgment below was reversed by the Fourth Circuit, in discussing procedures for remand the Court of Appeals reached two erroneous conclusions that are in derogation of the decisions of the Supreme Court and in conflict with the holdings of other Circuit Courts of Appeal:

(1) The Fourth Circuit upheld the trial court's denial of Rex Hospital's right to a jury trial on the "hotly contested" issue of preparedness by holding that:

[T]he question of whether to send a special interrogatory to the jury on this issue was within the discretion of the trial judge.

(Pet. App. A at 20a.)

(2) The Fourth Circuit also construed *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and held that defendants could be found liable for post-opposition delay caused solely by the congressional enactment of section 1122 and the subsequent rise in interest rates. The Court of Appeals held that under *Brunswick*:

[A]ppellants cannot escape liability merely because the injurious delay was compounded by enactment of the § 1122 amendments and rising interest rates.

(Pet. App. A at 19a-20a.)

REASONS FOR GRANTING THE WRIT

A. In Order to Protect a Litigant's Constitutional Right to a Trial By Jury This Court Should Address the Conflict Between the Circuits Concerning the Use of Rule 49(a)

The Fourth Circuit found that the preparedness of HBC to enter the Raleigh "market" was an issue "hotly contested at trial . . ." (Pet. App. A at 20a.) Evidence was introduced on the issue by defendants, including testimony from plaintiff's expert witness Conrad Taylor, the state official responsible for hospital site approval in 1972, who stated that the site would "not be approved" because it was too small. (App. III 1263-65, 1273-74.) The refusal of the trial court to submit a requested interrogatory on the issue was error and deprived defendants of their right to a jury trial on the critical issue of plaintiff's preparedness.

The holding of the Fourth Circuit, affirming the action of the trial court, is in direct, irreconcilable conflict with the holdings of the Fifth, Second and Sixth Circuits. See *Harville v. Anchor-Wate Co.*, 663 F.2d 598, 602-03 (5th Cir. 1981); *Simien v. S.S. Kresge Co.*, 566 F.2d 551, 555-56 (5th Cir. 1978); *Cutlass Productions, Inc. v. Bregman*, 682 F.2d 323, 327 (2d Cir. 1982); *Ajax Hardware Manufacturing Corp. v. Industrial Plants Corp.*, 569 F.2d 181, 187 (2d Cir. 1977); *National Bank of Commerce v. Royal Exchange Assurance of America, Inc.*, 455 F.2d 892, 898 (6th Cir. 1972).

In *Cutlass Productions*, for example, the Second Circuit held that "in order to preserve the right of the litigants to a jury trial of all factual issues, the wide discretion afforded the district court in submitting issues to the jury by way of special interrogatories is circumscribed by the requirement that they clearly present the

material fact issues raised by the pleadings and evidence." (682 F.2d at 327) (emphasis added.) The court held that the use of a special interrogatory form that "withdrew from the case one theory of defense asserted throughout the trial" was outside the discretion of the trial court even if the theory of defense was explained in the jury instructions. (682 F.2d at 328.) The Second Circuit concluded that the trial court's discretion

cannot be exercised in a manner which withdraws from the jury's consideration a *valid theory of defense* upon which defendant has produced sufficient evidence.

(682 F.2d at 328) (emphasis added.) The Fourth Circuit, in affirming the trial court's exercise of "discretion," permitted the trial judge to withdraw the preparedness issue from the jury. (Pet. App. A at 20a.) This holding squarely conflicts with *Cutlass Productions*.

The law in the Fifth Circuit is in full accordance with *Cutlass Productions*. In the Fifth Circuit, the trial court's discretion is limited to making the decision whether to submit a special verdict form to the jury and the form of the questions put to the jury. See, e.g., *Culver v. Slater Boat Co.*, 688 F.2d 280, 306 n.41 (5th Cir. 1982) (*en banc*). Once it is decided to submit the case, all "controlling issues raised by the pleadings and the evidence" must be covered by the special verdict form and the determination as to whether a material issue is to be submitted is outside the discretion of the trial court. *Duke v. Sun Oil Co.*, 320 F.2d 853, 865 (5th Cir. 1963).

In *Harville v. Anchor-Wate Co.*, for example, defendants in a products liability action requested a special jury interrogatory and jury instructions on the issue of misuse. Evidence as to the misuse defense was introduced but the trial court refused to submit the requested

interrogatory. The Fifth Circuit found that introduction of the evidence on the issue raised "a fact issue as to misuse that should have been submitted to the jury" and held that "the district court erred in failing to submit the issue of misuse to the jury." (663 F.2d at 603.) *Accord*, *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1173 (5th Cir. 1982) (reversing a finding of liability because "the trial court failed to submit to the jury a material issue" in the special interrogatories even though jury instructions had addressed the issue). The rule is the same in the Sixth Circuit. *National Bank of Commerce v. Royal Exchange Assurance of America, Inc.*, 455 F.2d 892, 898 (6th Cir. 1972) ("clear that all material factual issues raised by the pleadings and evidence should be covered . . ."). These holdings are squarely in conflict with the decision reached by the Fourth Circuit in this case.

These recent cases sharpen the longstanding conflict between the circuits on this issue. *See, e.g., Healey v. Catalyst Recovery, Inc.*, 616 F.2d 641, 648 (3d Cir. 1980) (trial judge "has wide latitude in deciding which issues should be covered by special interrogatories."); *Perzinski v. Chevron Chemical Co.*, 503 F.2d 654, 660 (7th Cir. 1974) ("district court has considerable discretion as to the nature and scope of the issues to be submitted . . ."); *R.H. Baker & Co. v. Smith-Blair, Inc.*, 331 F.2d 506, 508 (9th Cir. 1964) ("district court acted within its discretion in declining to put the suggested question to the jury").

Resolution of this conflict by this Court is important because Rule 49(a) has long been recognized as an important tool that avoids needless remands and promotes judicial efficiency since valid portions of a verdict may be salvaged under the rule. *See, e.g., Jones v. Miles*, 656 F.2d 103, 106 n.3, 108 (5th Cir. 1981). At the same time, Rule 49(a) must be carefully administered to avoid depriving a party of its constitutional

right to a jury trial. The rule emerging in the Fourth, Third and Ninth Circuit Courts of Appeal allows the sacrifice of vital constitutional rights in the lesser interest of judicial discretion.

B. The Recovery of Damages That Do Not Flow From and Are Not Related to an Antitrust Injury Is Not Permitted by *Brunswick* and Cannot Be Allowed "Merely Because" Such Damages Occurred In Conjunction with An Antitrust Violation

The only antitrust injury claimed at trial was purportedly caused by an alleged bad faith opposition to the application of HBC for its Certificate of Need. Plaintiff contended that "but for" the opposition it would not have had to comply with the section 1122 amendments and would not have been faced with the rise in interest rates in July of 1973. Thus, plaintiff sought, and received, recovery for damages indisputably flowing from the section 1122 amendments and the rise of interest rates—not from the opposition which ended in February 1973. The Fourth Circuit explicitly adopted this "but for" proximate causation analysis in determining whether plaintiff could recover damages for the additional delay allegedly caused by the section 1122 amendments and the rise in interest rates. (Pet. App. A at 19a.)

Such an approach was rejected by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). There, this Court held that a mere "but for" causation analysis was error because that approach "divorces antitrust recovery from the purposes of the antitrust laws. . . ." (429 U.S. at 487.) Under *Brunswick*, the Fourth Circuit erred because "plaintiff must show *more* than that it suffered injury causally linked to the antitrust violation. . . ." *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) (emphasis added.)

The proper approach is to require proof of "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." (429 U.S. at 489.) This standard "bases damages on the [defendant's] actual record of misconduct." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 298 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

In *Berkey*, a monopolist's price overcharge under section 2 was at issue. While it was clear that "excessive prices are 'injury of the type the antitrust laws were intended to prevent,'" the Second Circuit properly held that this characterization did not end the relevant inquiry under *Brunswick*. (603 F.2d at 297.) Plaintiff there could not recover the full amount of the differential between the monopolist's price and the price that would have existed had there been no monopoly but could only recover "to the extent that the price he paid exceeds that which would have been charged [by the monopolist] in the absence of anticompetitive action." (603 F.2d at 298.) Any differential in price between a purely competitive market and one in which the monopolist had acted lawfully could not be recovered.

The Fourth Circuit ignored the principles stated in *Brunswick* and applied in *Berkey*. As applied to this case, *Brunswick* and *Berkey* preclude an award of damages based on delay caused by the fortuitous enactment of section 1122 and the subsequent rise in interest rates because delay caused by these factors is not based on defendants' "actual record of misconduct." *Berkey*, 603 F.2d at 298. In essence, the Fourth Circuit read *Brunswick* as permitting recovery for delay caused by any factor proximately linked to the opposition merely because the opposition itself allegedly caused delay. (Pet. App. A at 19a.)

This holding makes nonsense out of the principle, affirmed in *Brunswick*, that damages must be "attribut-

able" to the "breakdown of competitive conditions" caused by the antitrust violation. *Chrysler Corp v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1980). Plaintiff's claimed injury based on the enactment of Section 1122 and the rise in interest rates is not "antitrust injury" because the delay caused by these factors bears no relationship to the presence or absence of an antitrust violation. See *Blue Shield of Virginia v. McCready*, — U.S. —, 102 S. Ct. 2540, 2551 n.19 (1982) (holding that "the relationship between the claimed injury and that which is unlawful in the defendant's conduct" must be considered under *Brunswick*). The failure of the Fourth Circuit to undertake the full analysis required by *Brunswick*, as applied by this Court in *McCready*, the Second Circuit in *Berkey* and the Sixth Circuit in *Chrysler* justifies a full review by this Court of the principles to be considered under *Brunswick*.

CONCLUSION

Should this Court grant the petition for a writ of certiorari requested by the HBC, it should also grant review of the issues raised in this cross-petition.

Respectfully submitted,

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April 28, 1983

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

CIVIL ACTION FILE NO. 4047

HOSPITAL BUILDING Co.,
Plaintiff,
vs.

TRUSTEES OF REX HOSPITAL, a corporation;
JOSEPH BARNES; RICHARD URQUHART, JR.,
Defendants.

SPECIAL VERDICT
QUESTIONS TO BE ANSWERED
BY THE JURY
ON CLAIMS BY PLAINTIFF HOSPITAL BUILDING
COMPANY AGAINST THE DEFENDANTS

1. Did one or more of the Defendants enter into a contract, combination or conspiracy with others to restrain interstate trade or commerce in the furnishing of medical-surgical hospital services in the Raleigh area?

Answer for each of the Defendants.

THE TRUSTEES OF REX HOSPITAL
("YES" OR "NO") _____

JOSEPH BARNES ("YES" OR "NO") _____

RICHARD URQUHART, JR.
("YES" OR "NO") _____

2. Did The Trustees of Rex Hospital enter into a contract, combination or conspiracy with others to monopolize

the market for medical-surgical services in the Raleigh area?

ANSWER "YES" OR "NO". _____.

3. Did The Trustees of Rex Hospital attempt to monopolize the market for medical-surgical hospital services in the Raleigh area?

ANSWER "YES" OR "NO". _____.

4. Did the acts of the Defendants, or any of them, taken alone or together with the acts of one or more co-conspirators, substantially and proximately cause injury to the business of Plaintiff Hospital Building Company?

ANSWER "YES" OR "NO". _____.

5(A). Did the State of North Carolina compel the Defendants to commit the acts Plaintiff complains of under a clearly articulated and affirmatively expressed state law?

ANSWER "YES" OR "NO". _____.

5(B). Did the State of North Carolina actively supervise the acts committed by Defendants of which the Plaintiff complains?

ANSWER "YES" OR "NO". _____.

If your reply to both Questions 5(A) and (B) is "Yes," do not answer Questions 6 and 7. If your reply to either Question 5(A) or (B) is "No", proceed to answer Question 6.

6. Did the acts committed by the Defendants in connection with the Medical Care Commission's consideration of Plaintiff's certificate of need application and/or in connection with the appeal to the Superior Court of Wake County constitute an abuse of the adjudicatory or judicial process which was part of a larger plan to violate the antitrust laws?

ANSWER "YES" OR "NO". _____.

If your reply to Question 6 is "No", do not answer Question 7. If your reply to Question 6 is "Yes", proceed to answer Question 7.

7. If your reply was "Yes" to Question 4, in what amount do you find that the business of Hospital Building Company was damaged?

State Such Amount in
Dollars and Cents or None

(A) Profits lost due to delay
in the opening of the
new hospital.

(B) Profits lost due to in-
creases in construction
costs over a period of
delay.

(C) Profits lost due to in-
creases in equipment
costs over a period of
delay.

All twelve jurors must agree on each answer that you make to each of the above questions.

Signed:

Foreperson of the Jury

MAY 27 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-1762

IN THE
Supreme Court of the United States
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a Corporation; JOSEPH BARNES,
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vs.

HOSPITAL BUILDING COMPANY,
Cross-Respondent.

**BRIEF IN OPPOSITION TO CROSS-PETITION
FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Whether the trial court, acting within the discretion contemplated by Federal Rule of Civil Procedure 49(a), properly applied that Rule when it fully instructed the jury on the issue of plaintiff's "preparedness" to enter the relevant market and declined to send a special written question to the jury on "preparedness."

2. Whether the Fourth Circuit correctly applied *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), in holding that the jury could properly find that plaintiff's injury was proximately caused by defendants' violations of the antitrust laws.

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No. 82-1762

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

TRUSTEES OF THE REX HOSPITAL,
a Corporation; JOSEPH BARNES,
and RICHARD URQUHART, JR.,
Cross-Petitioners,
vs.
HOSPITAL BUILDING COMPANY,
Cross-Respondent.

**BRIEF IN OPPOSITION TO CROSS-PETITION
FOR A WRIT OF CERTIORARI**

The conditional Cross-Petition for a Writ of Certiorari filed by defendants ¹ ignores the evidence that was presented to the jury at the trial of this case and the opinion of the United States Court of Appeals for the Fourth Circuit. The trial court thoughtfully and thoroughly, in its oral and written instructions to the jury (which were with the jury during its deliberations), stated the legal standards that governed HBC's "preparedness" to enter—actually, to expand in—the relevant market, and it

¹ The Statement of Related Companies Under Rule 28.1 appears at page iii of Hospital Building Company's Petition for Certiorari filed April 6, 1983 (No. 82-1633). Hospital Building Company is referred to in this brief as "HBC" or "cross-respondent"; defendants Trustees of the Rex Hospital, Barnes and Urquhart are referred to as "cross-petitioners." The other entities involved in this litigation will be referred to as they are in HBC's Petition.

properly applied Federal Rule of Civil Procedure 49(a). Moreover, both the trial court and the Fourth Circuit carefully followed the analysis of "antitrust injury" set forth in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and the Fourth Circuit's decision on that point was correct. In addition, the Fourth Circuit's rulings challenged by the Cross-Petition are consistent both with the holdings of other Courts of Appeals and with the holdings of this Court. Cross-petitioners are, therefore, wrong in their purported review of the law as applied to this case, and none of the reasons advanced in the Cross-Petition to justify a grant of certiorari is valid or sufficient. Cross-respondent HBC respectfully requests, therefore, that the Court deny the Cross-Petition for a Writ of Certiorari, which conditionally seeks review of certain aspects of the decision by the Fourth Circuit in this case.

HBC concurs in the statements in the Cross-Petition under the headings "Opinion Below," "Jurisdiction," and "Statutory Provisions and Rules Involved."

STATEMENT OF THE CASE

A. Proceedings Below.

The procedural history of this case is set forth at pages 2-3 of the Petition for a Writ of Certiorari filed by HBC on April 6, 1983 (No. 82-1633) (hereinafter "Petition" or "Pet.").

B. The Parties.

The parties are described at pages 3-4 of HBC's Petition.

C. The Facts.²

The facts of this case are more fully set forth in cross-respondent's Petition, and that statement is incorporated herein by reference. The following discussion reviews only those facts in the record that are relevant to the contentions asserted in the Cross-Petition for Certiorari.³

In December, 1970, Charter Medical Corporation, a publicly held company that owned and managed a number of for-profit hospitals, purchased HBC and announced that it would expand Mary Elizabeth Hospital, the health care facility owned by HBC. Cross-petitioners and their co-conspirators, in order to protect and implement a pre-existing market allocation scheme (*see* Pet. at 4-5), conspired to block that expansion and thus to forestall competition from HBC in the Raleigh market. The conspiracy involved two major schemes. The first part of cross-petitioners' conspiracy — their "primary plan" (VII 2855)⁴ — was to subvert the procedures prescribed by North

² References to the record on appeal are to the Joint Appendix and are cited by volume and page number to the Joint Appendix, viz, (VII 2855). Trial exhibits not in the Joint Appendix but in the record are cited by their numbers and preceded with a "P" or "D" to indicate the party which introduced the exhibit, viz, "P-1432." Portions of the trial transcript not in the Joint Appendix are cited by the prefix "TR."

³ The Statement of the Case in the Cross-Petition for Certiorari is erroneous in material respects. Cross-petitioners' legal arguments are based on that foundation of misleading and incomplete factual assertions.

⁴ *See* Appendix A at 1a (VII 2855), a letter dated January 29, 1973, from defendant Barnes to J. A. McMahon (the former president of Blue Cross of North Carolina) in which Barnes lamented the death of the conspirators' "primary plan" but announced that the conspirators would do "something . . . immediately to keep down more proprietary competition."

Carolina law for awarding a Certificate of Need to HBC.⁵ See Pet. at 6-7. When a decision by the North Carolina Supreme Court in an unrelated action invalidated the North Carolina Certificate of Need law, the conspirators turned to their "secondary plan." That scheme centered around an agreement to "keep down more proprietary competition" by having co-conspirator Blue Cross make it unprofitable for HBC to expand Mary Elizabeth.⁶

⁵ The conspirators' "primary plan" included multiple abuses of the MCC's procedures which denied effective and meaningful access by HBC to the MCC. When HBC finally obtained its Certificate of Need from the MCC, the conspirators instigated an appeal of that decision to the North Carolina courts despite legal advice from their own attorneys that the appeal was not likely to succeed on the merits and thus would not prevent HBC from expanding Mary Elizabeth, but could delay that expansion. See Appendices B and C at 2a-10a (VII 2790-2792, 2796-2797), which are letters from counsel for Rex and for the Health Planning Council advising that an appeal of the MCC's decision would be unsuccessful. The subsequent appeal of the MCC's decision to the North Carolina courts, in the face of this legal advice, constitutes a classic example of sham legal action taken for the sole purpose of causing economic harm to a competitor.

⁶ Cross-petitioners' assertions that opposition to HBC's construction of a new Mary Elizabeth ceased after the North Carolina Supreme Court invalidated the Certificate of Need law and that Blue Cross's discriminatory reimbursement policy did not delay construction of Mary Elizabeth (see Cross-Pet. at 5 n.4 and accompanying text) are flat mischaracterizations of the record. As the focal point of the "secondary plan," Blue Cross imposed against HBC an arbitrary reimbursement formula in order to limit the amount of insurance reimbursement HBC received for services rendered. (IV 1496-1497). Not-for-profit hospitals, such as Rex and Wake, continued to be reimbursed under the standard "charges" method. (VII 2864, 2869). HBC's contract, "which provided for return on equity limitation on profit," was "financially less feasible" than Rex's and Wake's contracts which paid "charges." (IV 1497). When HBC objected to Blue Cross's imposition of this discriminatory formula (VII 3100-3101), Blue Cross retaliated by refusing to recognize any of HBC's rate increases in calculating HBC's costs for purposes of reimbursement. While HBC's competitors received rate change approvals as a matter of course on a "charges" basis (VII 2864, 2869), HBC went from 1973 (I 352) until 1977 without approval of a single rate

In October of 1972, while cross-petitioners were still operating under their "primary plan," Congress enacted the Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329, which added Section 1122 to the Social Security Act (codified as amended at 42 U.S.C. §1320a-1 (1976 & Supp. V 1981)).⁷ Shortly after cross-petitioners' spurious opposition to HBC's Certificate of Need application in the North Carolina courts was dismissed, HBC filed a request for Section 1122 approval. By the time HBC's Section 1122 approval was granted in May, 1973, Blue Cross had imposed its discriminatory reimbursement policy, *i.e.*, the "secondary plan," and had thereby effectively continued the *unbroken* opposition to the proposed expansion of Mary Elizabeth.

The passage of time caused by these delays in the construction of HBC's new hospital resulted in the loss of

increase by Blue Cross. (I 352-353). This course of conduct diminished HBC's cash flow (I 351-352; VIII 3125) and, because of the importance of Blue Cross reimbursement to financing, adversely affected Charter's ability to finance an expansion by HBC. (IV 1496-1502). The "secondary plan" of the conspiracy (discrimination in reimbursement by co-conspirator Blue Cross) was thus used to implement Barnes' threat to "do something" and to do it "immediately to keep down more proprietary competition." See Appendix A at 1a (VII 2855).

⁷ Section 1122 required local or state health care planning agencies to approve certain capital expenditures prior to allowing reimbursement for those capital expenditures under Medicare or Medicaid. Cross-petitioners are wrong when they argue that Section 1122 approval was not needed prior to construction of HBC's new hospital. See Cross-Pet. at 6. The so-called opinion testimony to which cross-petitioners cling in support of that proposition sets forth an interpretation of Section 1122 that the trial court later ruled, as a matter of law, was incorrect. Compare V 2057-2061 with TR 4585-4586. Indeed, testimony that Section 1122 did not, prior to April of 1973, apply to projects such as the expansion of Mary Elizabeth was stricken from the record by the trial court because it was contrary to the language of the statute. (V 2119). No appeal was taken from the trial court's ruling.

funds for that facility. (III 944-945; IV 1482-1484). Thus, as a direct consequence of the delays caused by the conspiracy, funding available for the expansion of HBC was lost and the hospital could not be financed until 1977. (IV 1529-1534). At trial, HBC submitted alternative damages calculations—one which posited a fifty-one month delay and the other which was premised on a fifteen month delay. (P-1432). The jury, as finder of fact, was thus allowed to determine whether the illegal acts of cross-petitioners caused delay through the time HBC obtained its Section 1122 approval or through the time when the new hospital was actually constructed. The jury unanimously accepted HBC's evidence that cross-petitioners' conspiracy caused the longer delay.

D. The Fourth Circuit's Decision.

Judgment for HBC was erroneously reversed by the Fourth Circuit. In its discussion of a new trial, the Fourth Circuit did, however, correctly rule that: (1) HBC had demonstrated its "preparedness" to expand in the Raleigh market and, on the same point, that the trial court was within its discretion when it decided not to send a special interrogatory to the jury on the issue of HBC's "preparedness," 691 F.2d at 690, Pet. at 20a, and (2) the jury could properly find that the damages suffered by HBC "flowed" from the antitrust violations which had taken place, since the "delay in HBC's ability to enter the Raleigh hospital market is precisely the type of injury that the alleged 'allocation of the market' and 'refusal to deal' were likely to cause" 691 F.2d at 689-690, Pet. at 19a. These rulings by the Fourth Circuit were correct on both the facts and the law.

SUMMARY OF ARGUMENT

The Cross-Petition should be denied because neither of the questions raised in the Cross-Petition is worthy of certiorari. The first question—whether the trial court properly applied Rule 49(a) in deciding not to submit a written question on a particular evidentiary point to the jury—involves nothing more than the discretionary (and proper) application of one of the rules of civil procedure. The second question—whether the lower courts made proper rulings with respect to the issue of “antitrust injury”—is premised solely on cross-petitioners’ distortion of the record and of the Fourth Circuit’s opinion; that question similarly fails to present an important issue for the Court’s consideration.

REASONS FOR DENYING THE WRIT

A. The Trial Court and the Fourth Circuit Properly Applied Rule 49(a).

The Cross-Petition fails to recognize that (i) application of Rule 49(a) is left to the *discretion* of the trial court and (ii) the question of HBC’s preparedness to enter the Raleigh market was in fact submitted to and resolved by the jury, pursuant to the trial court’s instructions, as a part of the special interrogatory on the issue of causation of HBC’s injury.⁸ See special verdict question number four, Cross-Pet. at 2a. The preparedness issue was specifically subsumed in that interrogatory by virtue of the

⁸ The Cross-Petition uses terminology that confuses “special verdicts on written questions” (which the trial court employed in this case) under Rule 49(a) with interrogatories in support of a general verdict under Rule 49(b). Since there is little practical difference here, HBC will follow cross-petitioners’ terminology.

trial court's explicit instructions to the jury which required a finding of preparedness in order to find proximate cause of injury.⁹ See Appendix D at 11a-12a (I 271-272), the trial court's instructions to the jury on injury. Thus, in order to conclude, as the jury did, that the acts of the cross-petitioners "substantially and proximately cause[d] injury" (special verdict question number four, Cross-Pet. at 2a) to HBC, the jury *necessarily* found that HBC was prepared to enter the Raleigh hospital market.

It is readily apparent in this case that the trial court's general instructions and special interrogatories adequately covered the material issues. Thus, the Fourth Circuit's decision in this respect is in complete accord with opinions from other circuits.¹⁰ None of the cases cited by cross-petitioners as being "in direct, irreconcilable conflict" (Cross-Pet. at 9) with the Fourth Circuit's decision

⁹ What cross-petitioners actually attempt to do in the guise of claiming legal error on the Fourth Circuit's part is to re-argue factual matters that were determined against them by the jury. For example, cross-petitioners argue that "plaintiff's own expert witness . . . stated that the site [on which HBC proposed to build its hospital] was too small." See Cross-Pet. at 9. This statement is untrue and fails to present the Court with the full record on the issue. First, the witness in question was qualified by HBC as an expert for the limited purpose of expressing an opinion on hospital construction costs in the 1970's, and was not qualified by anyone as an expert on the adequacy of HBC's site. (III 1229-1230). More importantly, there was substantial evidence which showed that the site chosen by HBC for its new hospital (the 6.9 acre "Tucker" site) was adequate. (I 415; III 1150-1160). Indeed, the MCC, the only agency with authority to approve the site for HBC's new hospital, adopted in its order the findings of fact of its hearing officer who specifically approved HBC's site as "adequate." (VII 2833).

¹⁰ Cases from other circuits that have held there is no error under Rule 49(a) where the jury is adequately apprised of all issues in the case by general instructions include: *Columbia Plaza Corp. v. Security National Bank*, 676 F.2d 780, 789 (D.C. Cir. 1982) (rejecting a contention that the trial court erred by omitting from special interrogatories the legal theory of fraud resulting from concealment of materi-

is in fact contrary to or inconsistent with the opinion in this case. The cases cited by cross-petitioners stand only for the self-evident proposition that all material factual issues—such as all affirmative defenses or elements of an offense—must be presented to the jury, but in no way do those cases support an argument that the jury was not fully apprised of all of the issues in this case.¹¹ It is un-

al facts because the "concealment instruction was given . . . orally" and thus the "jury was well apprised of appellants' fraud theories"); *Healey v. Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641, 649 (3d Cir. 1980) ("because we view the question as one of materiality and because special interrogatory 1 required a finding as to materiality, we reject the defendants' argument [that it was an abuse of discretion not to have a special interrogatory specifically covering the question]"); *Dreiling v. General Electric Co.*, 511 F.2d 768, 774-75 (5th Cir. 1975) (finding no error in withholding a special interrogatory from the jury where the ultimate factual theories of liability were submitted in special interrogatory form and "a penultimate question [was] adequately covered in the court's general charge"); *Perzinski v. Chevron Chemical Co.*, 503 F.2d 654, 660 (7th Cir. 1974) ("Moreover, it is not error to refuse to submit a question or instruction where the issue is adequately covered by other questions or instructions"); *R. H. Baker & Co. v. Smith-Blair, Inc.*, 331 F.2d 506, 509 (9th Cir. 1964) ("the disputed question, when viewed in the context of the whole record, submitted the actual controversy between the parties on the issue of [patent] infringement to the jury"). See also *Tights, Inc. v. Acme-McCrory Corp.*, 541 F.2d 1047, 1060 (4th Cir.), cert. denied, 429 U.S. 980 (1976), cited by the Fourth Circuit at 691 F.2d at 690, Pet. at 20a.

¹¹ In glaring contrast to the record here, the cases cited by cross-petitioners dealt only with situations where the jury was denied the opportunity to consider one or more issues. See *Harville v. Anchor-Wate Co.*, 663 F.2d 598, 602 (5th Cir. 1981) ("The trial court, however, did not submit an instruction or interrogatory on the plaintiff's misuse of the product . . ."); *Simien v. S. S. Kresge Co.*, 566 F.2d 551, 556 (5th Cir. 1978) ("We need not decide whether the general charge adequately instructed the jury on this element; assuming that it did, the fact remains that nothing in the interrogatories would have allowed the jury to find for Kresge on the basis that it did not sell the jacket"); *Cutlass Productions, Inc. v. Bregman*, 682 F.2d 323, 327 (2d Cir. 1982) ("[T]he special interrogatories submitted to the jury, considered in conjunction with the district court's charge," failed to clearly present the material issues of fact raised by the

necessary—indeed, improper—to submit all evidentiary issues (such as the preparedness issue) to the jury in the form of special interrogatories. See *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318, 334 (5th Cir. 1981):

[T]here is no basis for [appellant's] apparent assumption that because an issue is important to the outcome of a case, the jury must be instructed to supply a specific answer informing the court how they resolved that one issue. No party is entitled to a special verdict on each of the multi-faceted, multitudinous issues essential to the resolution of a given case.

Here, the Fourth Circuit correctly affirmed that the trial court, in its discretion, submitted all material issues to the jury through its instructions and its special interrogatories. Thus, both lower courts properly *applied* the discretionary principles embodied in Rule 49(a), and the Fourth Circuit's opinion does not present any issue as to the scope, construction or standards of Rule 49(a). In addition, the Fourth Circuit's approval of the trial court's use of special interrogatories was in accord with the other

pleadings and evidence); *Ajax Hardware Manufacturing Corp. v. Industrial Plants Corp.*, 569 F.2d 181, 186 (2d Cir. 1977) (two of three alternative theories of recovery were withdrawn from the jury because "[o]nly the first theory was submitted to the jury in the charge and special interrogatories"); *National Bank of Commerce v. Royal Exchange Assurance of America, Inc.*, 455 F.2d 892, 897 (6th Cir. 1972) (the district court erred in not permitting the jury to answer certain interrogatories in "view of the alternative theories of relief asserted in the complaint and the evidence in the record"); *Duke v. Sun Oil Company*, 320 F.2d 853, 865 (5th Cir. 1963) ("The net result [of giving a qualifying instruction and refusing to give certain requested issues and instructions] was that the jury was not allowed to pass on one of [the plaintiffs'] principal theories"); *Chemtron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1173 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1254 (1983) (jury instructions on non-disclosure as a basis for liability were erroneous because the jury was not instructed or required to make the required threshold finding of a factual basis for a duty to disclose).

circuits. As a result, no issue worthy of consideration by the Court is presented under Rule 49(a).

B. The Fourth Circuit Properly Applied Brunswick.

On the record in this case and from a plain reading of the Fourth Circuit's decision, it cannot seriously be disputed that the Fourth Circuit correctly ruled that the delays and consequent lost profits HBC suffered "flowed" directly from the market exclusion practices which cross-petitioners directed at HBC and which HBC proved at the trial of this case. See *supra* pp. 3-6 and the record citations there. See also Appendices A, B and C at 1a-10a (VII 2855, 2790-2792, 2796-2797). At trial, the jury was correctly instructed¹²—and on substantial evidence found—that the conspiracy at issue caused "antitrust injury" to HBC's business based on the requirements set forth in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).¹³ Because HBC demonstrated that cross-peti-

¹² The trial court properly instructed the jury on *Brunswick*. See Appendix E at 14a.

¹³ The Fourth Circuit's decision in no way conflicts with the other cases cited by cross-petitioners. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 298 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), held only that injury based on the payment of excessive prices did not "flow from" a monopolist's illegal conduct where that conduct was not the "but for" cause of the excessive price level. *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1980), held that Chrysler, which claimed that it had been eliminated from the non-automotive air-conditioning market, had not alleged "antitrust injury" since its absence from that market was attributable to its voluntary withdrawal from the market and not to the defendant's alleged antitrust violations. Since the Fourth Circuit properly applied *Brunswick*, its decision is also consistent with footnote 19 in *Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540, 2551 (1982) (cited at 14 of the Cross-Petition) which merely reiterated the requirement that "the relationship between the claimed injury and that which is unlawful in the defendant's conduct [must be] considered in determining the redressability of a particular form of injury under §4."

tioners and their co-conspirators engaged in a horizontal conspiracy to allocate the market for hospital beds, which was intended to—and which did—suppress competition from HBC, the Fourth Circuit correctly ruled that HBC's inability to expand and its resulting loss of profits were injuries "of the type the antitrust laws were intended to prevent and that flow from that which makes defendants' acts unlawful." See 429 U.S. at 489. Thus, the Fourth Circuit plainly did not, as cross-petitioners suggest at page 12 of the Cross-Petition, adopt a "mere 'but for' causation analysis." In fact, the Fourth Circuit expressly stated:

An obvious motivation of [the conspirators'] delaying tactics is the hope that during the interim, an unforeseen occurrence will discourage or prevent the opposing party from realizing its plans. Appellants can hardly claim to have been surprised in this case by two intervening acts, Congressional enactment of the Section 1122 amendments to the Social Security Act and the interest rate increases. These could have prevented HBC from beginning construction until 1977. Accordingly, *we reject the appellants' contentions that these occurrences were intervening causes of the damages and that a jury could not find that the damages flowed from the alleged antitrust violations.*

...

[D]elay in HBC's ability to enter the Raleigh hospital market is precisely the type of injury that the alleged "allocation of the market" and "refusal to deal" were likely to cause and appellants cannot escape liability merely because the injurious delay was compounded by enactment of the Section 1122 amendments and rising interest rates.

691 F.2d at 689-690, Pet. at 18a-20a (emphasis supplied).

The law and the evidence do not support cross-petitioners' attempt to mislead the Court into believing that

HBC's injuries were caused by unrelated occurrences spread over several years.¹⁴ At trial, HBC established that a conspiracy among cross-petitioners and others prevented HBC from expanding Mary Elizabeth and providing Raleigh with badly needed hospital beds and that other factors were at most contributory to HBC's injury.¹⁵ The evidence demonstrated that cross-petitioners were fully conscious of the possibility—and indeed planned—that delays caused by their conspiracy would provide an opportunity for other factors adversely to affect HBC's expansion. See Appendices A, B and C at 1a-10a (VII 2855, 2790-2792, 2796-2797). Cross-petitioners cannot now claim that their conspiracy did not injure HBC even if their conspiratorial efforts were, in their view, assisted by other events.

¹⁴ Cross-petitioners' real argument is not that the Fourth Circuit misconstrued the law as set forth in *Brunswick* but that the Fourth Circuit reached a result, on the *Brunswick* issues, adverse to cross-petitioners. That is not a sufficient reason for the Court to grant the Cross-Petition. See S.Ct. Rule 17; R. Stern & E. Gressman, *Supreme Court Practice* 273 (5th ed. 1978).

¹⁵ Thus, what cross-petitioners really advance is a "sole cause" rule for proof of damages, which, of course, is not the law. It is sufficient that cross-petitioners "materially contributed to [HBC's] injury . . . or substantially contributed, notwithstanding other factors contributed also. . . . The plaintiff need not show that the illegality was a more substantial cause than any other." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 143-144 (1968) (White, J., concurring). See also *Weiman Co. v. Kroehler Mfg. Co.*, 428 F.2d 726, 729 (7th Cir. 1970) ("In order to establish damages, it is necessary for [plaintiff] to show only that defendant's illegal conduct 'materially contributed' to plaintiff's injury, notwithstanding the existence of other significant causative factors"). As stated in *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir.), cert. dismissed, 419 U.S. 987 (1974), the underlying requirement is that HBC prove "to a fair degree of certainty" that the damages arising from its injury were caused by the illegal acts of defendants. Pursuant to proper instructions on causation (see Appendix E at 13a-15a; I 278-280), the jury concluded that HBC carried that burden.

CONCLUSION

The Court should deny the conditional Cross-Petition for Certiorari.

Respectfully submitted,

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Dated: May 27, 1983

APPENDIX A

(VII 2855)

January 29, 1973

Mr. J. A. McMahon
President
American Hospital Association
840 North Lake Shore Drive
Chicago, Illinois 60611

Dear Alex:

I have enclosed a copy of the North Carolina Supreme Court decision that declares the Certificate of Need Law unconstitutional. This was written by I. Beverly Lake. Rex Attorney Steed's evaluation is also enclosed.

This, of course, kills our primary plan. We are immediately seeking reappraisal of both our financial feasibility study and the interest of the investment houses; we will do something—and we'll do it immediately to keep down more proprietary competition.

This could have far-reaching consequences, obviously. CHP in North Carolina will be rendered sterile.

Cordially,

/s/ JEB

Joseph E. Barnes
Director

JEB:nls
Enclosures

APPENDIX B
(VII 2790-2792)

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July 3, 1972

Mr. Joe Barnes, Director
Rex Hospital
1311 St. Mary's Street
Raleigh, North Carolina

Re: Charter Medical Corporation Application -
Appeal to Superior Court

Dear Joe:

As I promised to you Friday morning this will outline briefly the procedure which would be involved in the event that the decision of the Medical Care Commission to grant a certificate of need to Hospital Building Corporation is appealed to the courts.

The "certificate of need" statute provides that any decision concerning a certificate of need is subject to judicial review in the courts "as provided by law with regard to licensing decisions of any licensing agency". Although this language is not entirely clear, it is my opinion that in this case it means that the appeal to the court from the determination of a certificate of need by the Medical Care Commission is made in the same manner as an appeal from a licensing decision made by the

Medical Care Commission under the Hospital Licensing Act.

The procedure for such an appeal is set forth in G.S. 131-126.1 and provides that a notice of appeal to the Superior Court of the county in which the hospital is located or to be located must be filed within 30 days after the mailing or service of notice of the decision and a copy of the notice of appeal also filed with the Medical Care Commission. It is not clear by any means who has standing to file an appeal in this particular situation although I am of the opinion that the Health Planning Council would be the proper party. After notice of appeal is filed, the Medical Care Commission must "promptly" certify

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and file with the court a copy of the record and decision, including the transcript of the hearings on which the decision is based.

The case on appeal would be heard by a judge of the Superior Court, sitting without a jury. No additional evidence or witnesses would be permitted, but the case would be decided upon a review of the transcript of the hearings before the Medical Care Commission and oral arguments and briefs of counsel. The administrative findings of fact made by the Medical Care Commission, if supported by competent, material and substantial evidence in view of the entire record, are conclusive upon the Superior Court. In other words, the Superior Court cannot substitute its judgment for that of the Medical Care Commission in making findings of fact so long as the evidence in the record would support the findings of

the Commission. I think that in our situation there are numerous findings of fact which are not supported by any evidence, and in some cases directly contrary to the evidence, which would warrant a superior court in setting aside the decision of the Commission. There are also, in my opinion, numerous procedural errors in this proceeding which could justify a reversal of the decision. The Superior Court has the power to affirm, modify or reverse the decision of the Commission and the judgment of the Superior Court may be appealed to the Court of Appeals for further review. If the case is appealed, it would probably be some time in October or November of this year before it could be heard in Superior Court and about March of 1973, before it would be heard in the Court of Appeals.

One significant question is whether or not Charter Medical can start constructing its new hospital pending the appeal. Normally, an appeal from an administrative decision does not stay the operation of the decision pending the outcome of judicial review although the aggrieved party may apply to the reviewing court for a stay order which the court may grant or deny in its discretion upon such terms as it deems proper. The provisions of G.S. 131-126.14, which as indicated above are the judicial review provisions applicable to the Medical Care Commission, provide that pending final disposition of the matter "the status quo of the applicant or licensee shall be preserved, except as the court shall otherwise order in the public interest". What this language means in relation to a determination of a certificate of need is by no means clear, but I would doubt very much if Charter Medical would begin construction pending an appeal.

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An even more basic question is what can reasonably be expected as the ultimate outcome in the event that the decision is appealed. I feel, as I stated above, that because of the obvious deficiencies in the findings of fact supporting the decision of the Commission and the numerous errors in procedure and law that it would be reasonable to expect that a superior court would reverse the decision of the Commission. Even so, this reversal, if affirmed by the Court of Appeals, would probably be in the form of a remand to the Commission for a new hearing or further proceeding in accordance with the judgment. If the Commission still feels that the certificate of need should be granted it would not be too difficult for it to correct its procedural errors and make proper findings of fact and conclusions in such a way that would withstand any further judicial review. *Of course, with the passage of time involved in the appeal, Charter Medical could get discouraged and withdraw, new factual circumstances might arise, or the Commission might change its mind, but unless these things do happen we could not reasonably expect that the granting of the certificate of need could be blocked through court action.* [Emphasis supplied.]

I understand that the Health Planning Council will take official action as to whether or not to appeal the decision at its meeting on Wednesday, July 5, but that all indications are that it will appeal.

I will keep you fully advised.

6a

Warmest personal regards.

Very truly yours,

ALLEN, STEED AND PULLEN

/s/ Tom

Thomas W. Steed, Jr.

TWS,JR:jk

CC: All Trustees of Rex Hospital

APPENDIX C
(VII 2796-2797)

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July 12, 1972

Mr. George M. Stockbridge
Executive Secretary
Health Planning Council
For Central North Carolina
P. O. Box 61
Durham, North Carolina 27702

Re: Application of Hospital Building
Company (Mary Elizabeth Hospital)
Certificate of Need

Dear Mr. Stockbridge:

You requested my opinion as to whether Health Planning Council should appeal to the Superior Court from the final decision of the Medical Care Commission rendered on the 30th day of June, 1972 in the above matter.

Although the Superior Court would have the power to reverse the decision of the Medical Care Commission it is unlikely to do so, however, it may very well remand the proceeding to the Medical Care Commission for a rehearing because of procedural errors.

These are a few of the things that may constitute reversible error:

1. The Medical Care Commission undertook to have a judicial hearing which was not contemplated by the statute in which it allowed extensive incompetent evidence to come into the record (the Superior Court would base its decisions more narrowly upon only the competent evidence in the record).
2. The Medical Care Commission did not give the Health Planning Council the opportunity to be fully heard as contemplated by the statute as it allowed a hearing officer to be appointed to receive the testimony submitted by Health Planning Council.
3. The Hearing Officer appointed had in a previous opinion recommended adversely to the position of the Health Planning Council, and had rendered his opinion prior to the hearing.

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4. We have no assurance Medical Care Commission members individually had read or were fully apprised of the testimony presented by the Health Planning Council.
5. That Medical Care Commission refused to continue the statutory hearing for the Health Planning Council, therefore, not permitting a full presentation of the position of Wake Memorial Hospital.
6. The Attorney General's office lead Health Planning Council to believe that it would be represented by it at the first hearing and then failed to do so, therefore, depriving Health Planning Council of the opportunity to have counsel representing it.

7. In its final order the Medical Care Commission failed to make a finding of fact and conclusion of law but merely adopted its interim order in which at least one finding of fact was clearly erroneous.
8. Numerous findings of fact appear in the Medical Care Commission interim Order which does not appear to be supported by the weight of evidence as required by North Carolina General Statutes 131-126.14.
9. Medical Care Commission failed totally to make any finding of facts in respect to Health Planning Council's position in the interim order.
10. Medical Care Commission apparently considered a document submitted by the applicant perporing to repute the Booz, Allen and Hamilton, Inc., presentation which did not disclose the author and although evidentiary, but not in the form of a sworn statement.

We are of the opinion that in the event a new hearing was held for the Medical Care Commission now, it would in all probability reach the same result. *However upon appeal, the matter would be heard in the Superior Court, the Circuit Court of Appeals and perhaps in the Supreme Court which would take approximately one year. During this time there could be a substantial change in circumstances such as Rex Hospital acquiring the funds to go forward with its projected new hospital and Wake Memorial beginning its projected addition.* [Emphasis supplied.]

The immediate need for hospital beds in Wake County could again be re-examined in light of existing supplementary facilities or those in process.

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At some point a case should be appealed through the

Courts to provide guidelines for hearings for Certificate of Need in which Health Planning Council is involved. As you know, the Statute is somewhat confusing.

Although it would be expensive because of the voluminous record, we are of the opinion that Health Planning Council should appeal with the aid and assistance of Rex Hospital.

Sincerely yours,

HOFER, MOUNT, WHITE & LONG

/s/ Lillard

Lillard H. Mount

LHM:lc

APPENDIX D

(I 271-272)

* * *

Injury

In order to establish its right to bring this action against the defendants for alleged violations of the antitrust laws, plaintiff must also prove by the preponderance of the evidence each of the following two requirements:

1. Plaintiff was injured in its business or property.
2. The injury was a proximate cause or result of defendants' actions that plaintiff alleges to be a violation of the antitrust laws.

In this case, plaintiff claims injuries to its business as the direct result of alleged actions by defendants in violation of the antitrust laws to stop Hospital Building Company from constructing a new Mary Elizabeth Hospital to provide additional hospital services in the Raleigh area.

Specifically, plaintiff claims that the following injuries resulted from defendants' actions:

1. That defendants' alleged actions in violation of the antitrust laws caused delay in starting construction which in turn caused plaintiff to spend more money to build its new hospital than it otherwise would have been required to spend; and
2. That plaintiff lost revenues and profits that plaintiff could reasonably have anticipated from operating its hospital over the period of delay caused by defendants' alleged illegal activity.

In determining whether plaintiff has proven by a preponderance of the evidence that it was injured in its "business or property," you should consider the following factors:

One need not have an actual going business to establish a private antitrust injury. Recovery can be had for a wrongfully frustrated attempt to enter a business. There are two significant requirements which plaintiff must prove: (1) an intention to enter the business, and (2) a showing of preparedness to enter the business.

There are four elements of preparedness to enter the business: (1) the ability of plaintiff to finance the business and to purchase the necessary facilities and equipment; (2) the consummation of contracts by the plaintiff; (3) affirmative action by plaintiff to enter the business; and (4) the background and experience of plaintiff in the prospective business.

Just as in the case of one who desires to enter a business, for an antitrust plaintiff who desires to expand an existing business, there must be a showing of intent to expand and of preparedness for the expansion in order to establish the requirement of injury to plaintiff's business or property. The same considerations apply in determining whether plaintiff is prepared for an attempt to expand its existing business as for an attempt to enter a new business. That is, plaintiff must prove by the preponderance of the evidence its ability to finance the expansion of the business and to purchase the necessary facilities and equipment; the consummation of contracts by the plaintiff; affirmative action by plaintiff to expand the business; and the background and experience of plaintiff in the prospective business.

APPENDIX E

(I 278-280)

* * *

Proximate Cause—Damages

If you have found (1) that plaintiff has proven by the preponderance of the evidence that one or more defendants entered into a combination or conspiracy which restrained trade in interstate commerce and that plaintiff was injured as a result of that restraint; or (2) that one or more defendants entered into a conspiracy to monopolize or attempted to monopolize the relevant market and that plaintiff was injured as a result; and (3) that defendants' actions were not immunized from the antitrust laws, then you must next consider the amount of damages which plaintiff has suffered by reason of defendants' violation of the antitrust laws. Your concern is only with determining the damages. You are not to concern yourself with the judgment to be entered by the court in this case.

Plaintiff is entitled to recover damages, to the extent proven, for each and every injury to its business that was proximately caused by defendants' antitrust violation. Stated another way, if plaintiff has shown that defendants' wrongful actions were a substantial cause of injuries to it, then plaintiff is entitled to damages to be determined from the evidence of these injuries.

In order to recover damages, plaintiff does not have to prove that defendants' actions were the only cause or the predominant cause of its injuries. There may be several causes of plaintiff's injuries, and plaintiff should not be denied recovery because these causes, in addition to defendants' actions, substantially contributed to the injuries. Plaintiff must only show that defendants' wrongful actions were one of the substantial causes of the injuries claimed by it.

On the other hand, if plaintiff's damage was merely incidental, or if the defendants' antitrust acts were so removed from the injury as to be only remotely causative, then defendants' acts were not the proximate cause of plaintiff's injury.

The mere fact that the plaintiff may have suffered a loss in its expected profits, or an injury to its business, does not in and of itself prove such loss or injury was caused by any allegedly illegal act on the part of the defendants. It may be that you will find that such losses, or injury, to plaintiff's business was due to the manner in which plaintiff conducted its business, or was due to other causes, or matters over which the defendants in this case had no control and were not responsible. If you find such to be the case, then the acts of the defendants relied on by the plaintiff in this case would not be the cause or causes of its loss or injury. In other words, the damage or injury which it claims must be proximately caused by the alleged antitrust law violation. If its injury or damage was caused by other reasons, then it cannot recover for such injuries or damages.

Under the law, plaintiff must show more than that it suffered injury causally linked to the antitrust violation; the injury must be shown to have "flowed" from the wrong. To "flow from the wrong," the loss must be the type of loss that the claimed violations would be likely to cause. To be one of several causes is not enough. Finally, the injury must flow from that which makes defendants' acts unlawful.

Plaintiff's damages are to be reasonably approximated from the evidence presented in the case. Plaintiff is not required to prove with mathematical accuracy the extent of its losses in order to recover damages for them. Thus, plaintiff should not be denied damages simply because

you cannot calculate them with exactness or certainty. Of course, plaintiff may not be awarded damages based on pure speculation or guesswork.

As I stated before, plaintiff claims that its business was injured by reason of increased construction and equipment costs resulting from the delay in building its new hospital, and lost revenues and profits anticipated over the period of the delay. If, based on the instructions I already have given, you have determined that plaintiff is entitled to recover damages, then you should award plaintiff its damages as reasonably estimated from the evidence.

* * *

No. 82-1762

Office - Supreme Court, U.S.

FILED

JUN 8 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

TRUSTEES OF REX HOSPITAL, a Corporation;
JOSEPH BARNES, and RICHARD URQUHART, JR.,
v. *Cross-Petitioners,*

HOSPITAL BUILDING COMPANY,
Cross-Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR CROSS-PETITIONER

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Dated: June 7, 1983

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IN THE
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REPLY BRIEF FOR CROSS-PETITIONER

**I. A Material Issue of Fact as to Standing Cannot Be
Subsumed Into an Interrogatory Directed at Proximate
Causation**

In its opposition to the conditional Cross-Petition for Certiorari, cross-respondent implicitly concedes the existence of a split in the Circuits on the question of whether the trial judge has discretion to submit an interrogatory to the jury on a material issue of fact once it has been decided to submit special interrogatories to the jury. *Compare* cases cited at 8-9 n.10 of Br. in Opp. *with* cases cited at 9-10 n.11 of Br. in Opp. Cross-respondent argues only that the jury instructions and Special Interrogatory No. 4 dealing with proximate causation subsumed the inquiry into preparedness and made a separate question unnecessary. Br. in Opp. at 8.

Cross-respondent does not address the fact that the question of preparedness, although relevant to the question of proximate causation, independently presents a separate and distinct material issue of fact as to the standing of plaintiff to sue for an injury to its business or property under the antitrust laws. *Hayes v. Solomon*, 597 F.2d 958, 973 & 977 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980) (dismissing claim for lack of preparedness because "injuries for which damages were awarded were not antitrust injuries"). The question is not whether plaintiff suffered injury, but whether the injury suffered was to its business or property within the meaning of Section 4 of the Clayton Act. *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-37 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966) (failure to show preparedness disposes of claim because plaintiff "was not injured in his business or property and thus could not make the showing necessary to obtain relief under § 4").

This distinct inquiry into whether plaintiff suffered an injury to its business or property cognizable under Section 4 and, therefore, had standing to sue is *not* fairly presented to the jury by the question, "Did the acts of defendants . . . substantially and proximately cause injury to the business of Plaintiff . . . ?" See Appendix to Cross-Petition at 2a; Int. No. 4. A separate and distinct material issue of fact that is dispositive in its own right cannot be withdrawn from the jury at the sole discretion of the trial court without creating a conflict with the express decisions of the Second, Fifth and Sixth Circuits cited by both cross-respondent and cross-petitioners.

II. Neither the Jury Nor the Fourth Circuit Considered the Effect of Any Blue Cross Policy in Determining Defendants' Liability for Antitrust Injury

Cross-respondent's opposition to granting certiorari on this issue is predicated in large part upon the contention that a so-called "'secondary plan'" involving Blue Cross reimbursements "adversely affected Charter's ability to

finance an expansion by HBC." Br. in Opp. at 4-5 n.6. Cross-respondent states that the "delays and consequent lost profits HBC suffered 'flowed' directly from the market exclusion practices directed at HBC." Br. in Opp. at 11. Thus, cross-respondent suggests that the *Brunswick* test is satisfied when the alleged Blue Cross policy is considered in the *Brunswick* analysis. Br. in Opp. at 4.

This contention misconstrues the record because the issue of Blue Cross reimbursement was not put to the jury and was never considered by the Fourth Circuit in its analysis of *Brunswick*. Special Interrogatory No. 6 specifically limited the award of damages to defendants' opposition to plaintiff's application for a Certificate of Need.* Accordingly, the decision of the Fourth Circuit was expressly limited to these "delaying tactics" and did not consider the effect of any Blue Cross policy under *Brunswick*. Appendix A to the Petition for Certiorari at 19a. Cross-respondent cannot raise arguments with respect to Blue Cross when the jury never passed on the issue in determining injury and damages.

Moreover, plaintiff's reliance upon the Fourth Circuit's characterization of the injury claimed as being "of the type the antitrust laws were intended to prevent" does not satisfy the inquiry mandated by *Brunswick*. Br. in Opp. at 12. As discussed in the Cross-Petition at 13-14, this limited inquiry squarely conflicts with the holdings of *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), and *Chrysler Corp. v. Fedders Corp.*, 643 F.2d

* Interrogatory No. 6 allowed the jury to award damages only if it answered "yes" to the following question: "Did the Acts committed by the defendants in connection with the Medical Care Commission's consideration of plaintiff's Certificate of Need application and/or in connection with the appeal to the Superior Court of Wake County constitute an abuse of the adjudicatory or judicial process which was part of a larger plan to violate the antitrust laws?" Appendix to Cross-Petition at 2a; Int. No. 6.

1229, 1235 (6th Cir.), *cert. denied*, 454 U.S. 893 (1980), because the Court of Appeals here failed to consider whether the injury alleged was in any way attributable to the breakdown in competitive conditions allegedly caused by the claimed violation. *See* Appendix A to the Petition for Certiorari at 19a.

III. Conclusion

Cross-petitioners have established that the twin holdings of the Fourth Circuit on which certiorari is sought are in direct conflict with the holdings of other Circuit Courts of Appeal. The issues were squarely presented by the record before the Fourth Circuit when it articulated these erroneous legal principles. If cross-respondent's Petition for Certiorari is granted, the issue raised in the Cross-Petition for Certiorari should be heard by this Court as well.

Respectfully submitted,

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Dated: June 7, 1983